

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KEITH PHELAN,

Defendant/Petitioner,

Case Number: 03-CV-73942-DT
98-CR-80812-02

v.

UNITED STATES OF AMERICA,

JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

Plaintiff/Respondent.

/

**ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
IN FAVOR OF DENYING PETITIONER'S MOTION TO VACATE SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

Before the Court is the Magistrate Judge's Report and Recommendation in favor of denying Petitioner's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255.

Having reviewed that Report and Recommendation, Petitioner's objections thereto, and Respondent's reply to those objections, the Court enters as its findings and conclusions the Report and Recommendation in favor of denying Petitioner's motion to vacate his sentence.

The Court notes that the Supreme Court's intervening decision in *United States v. Booker*, – U.S. –, 125 S.Ct. 738 (2005), now governs Petitioner's claim under *Blakely v. Washington*, – U.S. –, 124 S.Ct. 2531 (2004). *Booker* applied “the *Blakely* reasoning to the Federal Sentencing Guidelines,” and held that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a

reasonable doubt.’’ *Humphress v. United States*, 398 F.3d 855, 860 (6th Cir. 2005) (quoting *Booker*, 125 S.Ct. at 756). Yet, *Booker* does not apply retroactively to cases that are already final on direct review, as in Petitioner’s case. *Id.* at 857.

SO ORDERED.

s/Paul D. Borman

PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

Dated: September 2, 2005

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on September 2, 2005.

s/Jonie Parker

Case Manager